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No. 89-624

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

MAISLIN INDUSTRIES, U.S., INC., *et al.*,
Petitioners,

v.

PRIMARY STEEL, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF OF ONEIDA MOTOR FREIGHT, INC., MILNE TRUCK LINES, INC., CAMPBELL 66 EXPRESS, INC., WEST COAST TRUCK LINES, INC., C. KENNETH STILL, TRUSTEE, SCOTT N. BROWN, JR., TRUSTEE, COLISEUM CARTAGE COMPANY f/k/a PACESETTER TRANSPORTATION COMPANY, FELDSPAR TRUCKING COMPANY, INC., STEPHEN K. YODER, TRUSTEE, BARRY S. SCHERMER, TRUSTEE, JAMES G. DUFFY, TRUSTEE, LANGDON M. COOPER, TRUSTEE, SANFORD I. FELD, TRUSTEE, WILLIAM J. HUNT, TRUSTEE, AND BRUCE H. LEVITT, TRUSTEE AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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The organizations and individuals listed above respectfully file this brief as amici curiae in support of Petitioners. Written consent has been obtained from counsel for Petitioners, Respondent and the Solicitor General for the filing of this brief pursuant to Supreme Court Rule 37. The letters reflecting consent have been filed with the clerk's office.

INTEREST OF AMICI CURIAE

Petitioners, Respondent and various Amici filing briefs in this case agree on one thing—the undercharge issue reflected in this proceeding and hundreds of other court proceedings is the result of unbridled competition among regulated motor common carriers following enactment of the Motor Carrier Act of 1980, Pub. L. 96-296, 94 Stat. 793, July 1, 1980. That legislation accomplished major regulatory reform with a general purpose of increasing competition, efficiency, and economy within the motor carrier industry.[1] At the same time, Congress emphasized the need for continued regulation of the motor carrier industry and admonished the Interstate Commerce Commission ("ICC") "to stay within the powers specifically vested in it by the revised law."[2] As pertinent, entry and rate regulation were scrutinized and carefully revised to provide carriers with greater flexibility within the framework of the law.

The economic forces of supply and demand became operative and carriers began, as hoped, to discount their prices to obtain or retain market share. Some carriers were unable to survive as discounting escalated and for this and undoubtedly other reasons, motor carrier bankruptcies began to mushroom in the early 1980's. In an effort to marshall the assets of defunct motor carriers trustees and auditors began sifting through carrier accounts and discovered that many rates negotiated and billed by carriers, for whatever reason,were never published in tariffs on file with the ICC as required by law, 49 U.S.C. Section 10761(a). Properly viewed as monies lawfully due to their estates, trustees commenced actions to recover the difference between the amounts previously received by the carriers and the amounts lawfully due under the applicable tariffs.

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[1] *See* House Report No. 96-1069, June 3, 1980, p. 3, reproduced in 1980 U.S. Cong. and Admin. News Service, at p. 2285.

[2] *Id.*, p. 2293.

The issue, and therefore the controversy, before the Court is whether Congress has given the ICC the power to declare a carrier's failure to file an agreed upon ("negotiated") rate, an unreasonable carrier practice which could then be used by a shipper as a defense to the carrier's or its successor-in-interest's collection action for the filed rate charges.

For over eighty years, this Court and the ICC have agreed that there is no "unreasonable practice" or equitable defense to the collection of the filed tariff charges. However, in 1986 the ICC changed its "policy" with respect to undercharges, from a declaration that it lacks jurisdiction to make an "unreasonable practice" finding in a motor carrier undercharge case, to now asserting that it has the power to declare that a shipper/carrier unfiled rate agreement takes precedence over the carrier's filed rates. This dramatic policy shift (admittedly without clear congressional approval) has resulted in divergent court opinions.

Many courts have rejected the ICC's new found "unreasonable practices" jurisdiction finding it repugnant to the antidiscrimination purposes of the Interstate Commerce Act and have, therefore, rejected the shipper's claim of a negotiated rate as providing a defense to the carrier's collection of the filed rate. However, many other courts have approved of the ICC's suggestion that it alone, under the doctrine of primary jurisdiction, can review undercharge cases, and through this review, provide shippers with an equitable defense to the collection of the filed rate charges. In order to resolve the uncertainty caused by the ICC's negotiated rate policy statements, this Court granted certiorari of the instant action.

The amici joining in this brief represent motor carriers either in liquidation outside of bankruptcy; Milne Truck Lines, Inc. and Feldspar Trucking Company, Inc.; Chapter 11 Debtors-In-Posession; Oneida Motor Freight,

Inc., Campbell 66 Express, Inc., West Coast Truck Lines, Inc., Coliseum Cartage Company f/k/a/ Pacesetter Transportation Company; or Chapter 7 Trustees of bankrupt motor carriers; C. Kenneth Still, Trustee for Southwest Equipment Rental d/b/a Southwest Motor Freight, Scott N. Brown, Jr., Trustee for Express Transportation Company, Inc., Stephen K. Yoder, Trustee for Suburban Motor Freight, Inc., James G. Duffy, Trustee for Canny Trucking Co., Inc., Langdon M. Cooper, Trustee for Carolina Motor Express, Inc., Sanford I. Feld, Trustee for Brinke Transportation Company, Inc., William J. Hunt, Trustee for Ritter Transportation, Inc., Bruce H. Levitt, Trustee for Jayne's Motor Freight, Inc. and Barry S. Schermer, Trustee for Orscheln Brothers Truck Lines, Inc. These carrier interests have presently pending cases throughout the United States involving freight undercharge disputes similar to that which forms the basis of Maislin Industries' claim against Primary Steel. In addition, many of these carrier interests have cases pending in various Circuit Courts of Appeals.[3]

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[3] First Circuit, *Delta Traffic Service, Inc. and Oneida Motor Freight, Inc. v. Transtop Inc.*, No. 89-1662, (argued 11/7/89); Second Circuit, *Delta Traffic Service and Oneida Motor Freight, Inc. v. Appco Paper and Plastic Corp.*, No. 88-9057, decided January 4, 1990, suggestion for rehearing en banc filed; Fourth Circuit, *Langdon M. Cooper, Trustee for Carolina Motor Express, Inc. v. Delaware Valley Shippers, et al.*, No. 89-3259 and Consolidated Nos. 89-3261 and 89-3262, (argued 12/7/89); Seventh Circuit, *Orscheln Bros. Truck Lines, Inc., et al. v. Zenith Electric Corp. and ICC*, No. 88-1261 and Consolidated Nos. 89-1329 and 89-1330, (argued 1/10/90); Ninth Circuit, *Delta Traffic Service and West Coast Truck Lines, Inc. v. Weyerhauser Co.*, No. 89-35115 and Consolidated Nos. 89-35121 and 89-35167, decided January 4, 1990, suggestion for rehearing en banc filed; mandate stayed; Eleventh Circuit, *Feldspar Trucking Company, Inc. v. Greater Atlanta Shippers Assn., Inc.*, No. 89-8450, (argued 1/25/90).

SUMMARY OF ARGUMENT

The Eighth Circuit in *Maislin Industries, U.S., Inc.* v. *Primary Steel, Inc.*, 879 F.2d 400 (8th Cir. 1989) was incorrect in finding that the Plaintiff Maislin should not be awarded its claim for undercharges based upon the difference between the higher filed tariff rates and the lower "negotiated" rates. The filed rate doctrine as codified at 49 U.S.C. Section 10761(a) has long required the strict enforcement of tariffs. Contrary to the decision by the Eighth Circuit, the Motor Carrier Act of 1980 did not relieve a carrier's duty to charge and a shipper's obligation to pay the filed tariff rate. The fact that the provisions of 49 U.S.C. Section 10761(a) were untouched by Congress despite extensive revision to other parts of the statute strongly suggests Congressional approval of the filed rate doctrine. Any action by the ICC to abrogate this Congressional policy, even under the guise of its unreasonable practice jurisdiction, is contrary to its statutory authority.

Moreover, this Court has upheld the strength and vitality of the provisions of 49 U.S.C. Section 10761(a) since the enactment of the Motor Carrier Act of 1980.

ARGUMENT

THE DECISION BY THE EIGHTH CIRCUIT IS INCONSISTENT WITH THE STATUTORY PURPOSE AND LEGAL PRECEDENT ENFORCING THE FILED RATE DOCTRINE

A. This Court Has Consistently Applied The Filed Rate Doctrine And Has Rejected Attempts To Find Exceptions To The Rule

The Eighth Circuit's decision adopting the ICC findings and dismissing the undercharges claimed owed incorrectly interprets or ignores established Supreme Court precedent. The Supreme Court has consistently held that carriers subject to the Interstate Commerce

Act must collect, and shippers must pay, all lawful charges set forth in the applicable tariffs. In *Louisville & Nashville R. Co. v. Maxwell*, 237 U.S. 94, 97 (1915) (emphasis supplied) this Court said:

> Under the Interstate Commerce Act, the rate of the carrier duly filed is the *only* lawful charge. *Deviation from it is not permitted upon any pretext.* Shippers and travelers are charged with notice of it, and they as well as the carrier must abide by it, unless it is found by the Commission to be unreasonable. *Ignorance or misquotation of rates is not an excuse for paying or charging either less or more than the rate filed.* This rule is undeniably strict, and it obviously may work hardship in some cases, but it embodies the policy which has been adopted by Congress in the regulation of interstate commerce in order to prevent unjust discrimination.

In *Armour Packing Co. v. U.S.*, 209 U.S. 56, 81 (1908), this Court explained the rationale for the rigid rule of the filed rate doctrine:

> If the rates [filed and published as required by law] are subject to secret alteration by special agreement, then the statute will fail of its purpose to establish a rate duly published, known to all, and from which neither shipper nor carrier may depart.

This Court has applied this rule of law every time it has addressed the issue of adherence to lawful common carrier rates including those arising in the post Motor Carrier Act of 1980 era. In *Thurston Motor Lines, Inc. v. Jordan K. Rand, Ltd.*, 460 U.S. 533, 535 (1983) this Court stated:

> A carrier's claim is, of necessity, predicated on the tariff—not an understanding with the shipper.

In *Southern Pacific Transp. Co. v. Commercial Metals Co.*, 456 U.S. 336, 352 (1982) (citation omitted) the carrier's violation of the credit regulations did not act to overcome the time honored maxim that:

> no act or omission of the carrier (except the running of the statute of limitations) [will] estop or preclude it from enforcing payment of the full amount by a person liable therefor.

See also Baldwin v. Scott County Milling Co., 307 U.S. 478, 484-85, *reh'g denied*, 308 U.S. 631 (1939); *Louisville & Nashville R. Co. v. Central Iron & Coal*, 265 U.S. 59, 65 (1924) (no contract of carrier can reduce the amount legally payable for transportation of freight in interstate commerce); and *Louisville & Nashville R. Co. v. Rice*, 247 U.S. 201, 202 (1918).

Not only has this Court consistently applied the filed rate doctrine, but the ICC has been held to be without statutory authority to waive the requirements of 49 U.S.C. Section 10761(a). As Justice Scalia stated in *R.C.C.C. v. United States*, 793 F.2d 376, 379 (D.C. Cir. 1986):

> That requirement [for a rate to be contained in a tariff] is utterly essential to the Act. Without it, for example, it would be monumentally difficult to enforce the requirement that rates be reasonable and nondiscriminatory, *see* 49 U.S.C. Sections 10701 and 10741(b) and virtually impossible for the public to assert its right to challenge the lawfulness of existing or proposed rates, *see* 49 U.S.C. Sections 10708(a)(1) & 11701(a).

This is further evidenced in the ICC's two policy statements; *National Industrial Transportation League—Petition to Institute Rulemaking On Negotiated Motor Common Carrier Rates, Ex Parte No. MC-177*, 3 I.C.C. 2d 99, (1986) ("Negotiated Rates I") and *National Industrial Transportation League—Petition to Institute Rulemaking on Negotiated Motor Common Carrier Rates, Ex Parte No. MC-177*, 5 I.C.C. 2d 623 (1989) ("Negotiated Rates II") wherein the ICC has concurred that it has no authority to order the waiver of undercharges. *Negotiated Rates I*, 3 I.C.C. 2d at 102. *Negotiated Rates II*, 5 I.C.C. 2d at 625.

As recently as 1986 this Court reaffirmed the continued vitality of the filed rate doctrine in *Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409 (1986). In *Square D*, this Court, construing the interstate commerce law subsequent to the Motor Carrier Act of 1980, quoted with approval from *Keogh v. Chicago & North Western R. Co.*, 260 U.S. 156 (1922), stated:

> The legal rights of shipper as against carrier in respect to a rate are measured by the published tariff. Unless and until suspended or set aside, this rate is made, for all purposes, the legal rate, as between carrier and shipper. The rights as defined by the tariff cannot be varied or enlarged by either contract or tort of the carrier. [citation omitted]. This stringent rule prevails, because otherwise the paramount purpose of Congress—prevention of unjust discrimination—might be defeated.

Square D, *supra*, 476 U.S. at 416-17. In *Square D*, the petitioner asserted that the pro-competitive policy of the Motor Carrier Act of 1980 would be furthered by the elimination of the antitrust exemption in *Keogh*. In response the Court stated:

> [W]e may assume that petitioners are correct in arguing that the Keogh decision was unwise as a matter of policy—but it nevertheless remains true that Congress must be presumed to have been fully cognizant of this interpretation of the statutory scheme, which had been a significant part of our settled law for over half a century, and that Congress did not see fit to change it when Congress carefully reexamined this area of the law in 1980. Petitioners have pointed to no specific statutory provision or legislative history indicating a specific Congressional intention to overturn the longstanding Keogh construction; harmony with the general legislative purpose is inadequate for that formidable task.

Id. at 420.

Clearly, this Court has a wealth of precedent to support the continued strength and viability of the filed rate doctrine as embodied in 49 U.S.C. Section 10761(a). It is a doctrine that is deeply woven into our national transportation framework and it is the cornerstone of the Interstate Commerce Act's anti-discrimination purpose.

B. The Congressional Policy Of Anti-Discrimination And Strict Enforcement Of Tariffs Has Remained Unchanged Despite Extensive Changes In Other Sections Of The Statute

Respondent and the ICC believe that the Transportation Policy codified at 49 U.S.C. Section 10101 provides authority to deem the collection of the filed rate an unreasonable practice when confronted with a negotiated unfiled rate. The ICC's perceived authority is alleged to come from 49 U.S.C. Section 10101(a)(2), which provides that motor carrier regulation is "to promote competitive and efficient transportation services," in order to achieve, among other things, "a variety of quality and price options to meet changing market demands and the diverse requirements of the shipping and traveling public." However, this broad policy statement does not provide the authority the ICC claims. On the contrary, the language contained in 49 U.S.C. Section 10101(a)(1)(D) clearly states that it is also the policy of Congress "to encourage the establishment and maintenance of reasonable rates for transportation, without unreasonable discrimination or unfair or destructive competitive practices." This is not a departure from past policy, but a reaffirmation of Congress' continued commitment to eliminate rate discrimination. As this Court keenly noted in *Commercial Metals*; *supra*;

> This rule of strict adherence to statutory standards is in line with the historic purpose of the Interstate Commerce Act—to achieve uniformity in freight transportation charges, and thereby to eliminate the discrimination and favoritism that had plagued the railroad industry in the late 19th Century.

456 U.S. at 344 (citation omitted). Therefore, this reliance by the ICC and Respondent on the "changed national transportation policy" is a fiction created to allow rate discrimination by excusing shipper from paying the full tariff rate.

Admittedly, Congress did make extensive changes in the regulation of motor carriers in the Motor Carrier Act of 1980. However, Congress spoke as loudly by the changes it did not make. Despite major revisions in related sections, Congress left untouched the requirement of strict enforcement of tariffs contained in 49 U.S.C. Section 10761(a), presumably with full knowledge of the unwavering judicial interpretation of this provision. The legislative history reinforces this view. Senator Cannon, one of the sponsors of the 1980 Act, explained: "This bill gives specific direction to the Interstate Commerce Commission and we expect those directions to be followed. Where the Commission is to be given more discretion, it is clear from the statute, but in most cases, the discretion is eliminated." 126 Cong. Rec. 7777 (1980) (remarks of Senator Cannon). Moreover, the House Committee on Public Works and Transportation specifically warned the ICC to carefully follow the statute in any regulatory initiatives. The Committee stated:

> In revising the statute, Congress also intends to give the Interstate Commerce Commission explicit direction for the regulation of the motor carrier industry and to ease that industry's uncertainty about the future of regulation by the Commission. *The Commission is admonished to stay within the powers specifically vested in it by the revised law.*

H.R. Rep. No. 96-1069, 96th Cong. 2d Sess., at 10-11 (1980) (emphasis supplied). This admonishment was fueled by concerns that without strict congressional leadership on deregulation, the ICC would begin a "*de facto*" deregulation at the administrative level. 126 Cong. Rec. H. 5352 (daily ed. June 19, 1980) (remarks

of Rep. Shuster); 126 Cong. Rec. H. 5345-46 (daily ed. June 19, 1980) (remarks of Rep. Harsha).

While it is true that Congress sought to increase competition in the motor carrier industry, it never intended to restrict the power of the Act regarding discrimination. H.R. Rep. No. 96-1069 at 25. It is apparent upon examination of the legislative history that 49 U.S.C. Section 10761(a) was not inadvertently left on the books, but rather that Congress intended to continue the requirements of public filing and strict enforcement of tariffs by the ICC and the courts. Accordingly, the fact that Congress made major changes in the Interstate Commerce Act while leaving 49 U.S.C. Section 10761(a) intact makes any action by the ICC to relax its requirements beyond the ICC's statutory authority.

Nowhere is congressional control over the filed rate doctrine more patently evident than in the household goods provision. *See* 49 U.S.C. Section 10735. Congress allowed motor common carriers to "establish a rate for the *transportation of household goods* which is based on the carrier's written, binding estimate of charges for providing such transportation." 49 U.S.C. Section 10735 (a)(1) (emphasis supplied). Here, Congress specifically provided an exception for a motor common carrier to allow a negotiated unfiled rate to be binding upon the parties.

Congressional intent to leave the filed rate doctrine intact is further evidenced by the fact that the Motor Carrier Act of 1980 retained in the filed rate statute specific authority for the ICC to grant relief from the filed rate requirement *only* for contract carriers, *not* for common carriers. 49 U.S.C. Section 10761(b). The fact Congress continued to limit the ICC's authority to grant relief from the filed rate statute for contract carriers only, highlights the ICC's lack of authority to alter the operation of the filed rate statute between common carriers and their customers.

The Fifth Circuit in *Supreme Beef Processors, Inc. v. Yaquinto*, 864 F.2d 388 (5th Cir. 1989), pointed out that this Court had recently followed this same reasoning in holding that the Motor Carrier Act of 1980 did not compel abandonment of a long established interpretation of the Interstate Commerce Act. The Fifth Circuit recognized that the Supreme Court in *Square D, supra*, reasoned that Congress must have been aware of the long-established doctrine when it passed the 1980 Act, and Congress, having refrained from specifically changing the statutory provision, should not be presumed to have intended to change it. 864 F.2d at 390-91, quoting, *Square D Co. v. Niagara Frontier Tariff Bureau*, 476 U.S. 409 (1986).

Likewise, the ICC has specific congressional authority in 49 U.S.C. Section 10762 to depart from the statute's requirement as to how long a rate must be filed before it may become effective. 49 U.S.C. Section 10762(d). The ICC has used this authority to promulgate a rule that a reduced rate may become effective one day after filing. 49 C.F.R. Section 1312.4(e) (1988); *Southern Motor Carriers Rate Conference v. United States*, 773 F.2d 1561 (11th Cir. 1985). The reason for shortening the notice period appears obvious. The period was shortened so that carriers and shippers can negotiate lower rates for immediate shipping, yet, still abide by the filed rate statute.

Thus, when Congress has wanted to allow the ICC to depart from a requirement clearly established by statute, Congress has included specific authority in the statute to depart from its requirements. However, except for the transportation of household goods, Congress has never given the ICC authority to hold a motor common carrier's unfiled rate supreme over its filed rate.

This conclusion was reached by the Fifth Circuit Court of Appeals in considering the propriety of the ICC's policy statement in *Negotiated Rates I*. In *Supreme Beef, supra*, the Fifth Circuit noted that Congress left Section 10761(a) untouched, even though it liberalized the requirements for contract cartage. 864 F.2d at 390-91. Relying heavily on *Square D Co. v. Niagara Frontier Tariff Bureau, supra*, the Fifth Circuit held that the Motor Carrier Act of 1980 affirmed, rather than repealed the filed rate doctrine.

C. The ICC's General Reasonable Practice Jurisdiction Cannot Be Used To Nullify The Specific Requirements Of Other Sections Of The Statute

Central to this genre of cases is the purported conflict between 49 U.S.C. Sections 10701(a) and 10761(a). What is not explained by the *Maislin* decision is that those two sections of the Interstate Commerce Act had peacefully co-existed for decades until the ICC issued its policy statements in *Negotiated Rates I & II*. It is only this most recent and extravagant expansion by the ICC of its definition of "reasonable practice" which puts the ICC in conflict with the congressional policy of anti-discrimination and strict enforcement of tariffs. As evidence of this capriciousness, Amici bring to this Court's attention the case of *Atlas Foundry & Machine Co. v. IML Freight, Inc.*, 1985 Fed. Carr. Cas. (CCH) para. 37,162 at 47,611 (ICC 1985) which was decided prior to the *Negotiated Rates* policy statements but subsequent to the enactment of the Motor Carrier Act of 1980. In *Atlas* the archetypal negotiated rates scenario was proffered to the ICC with the defense of an unreasonable practice pursuant to 49 U.S.C. Section 10701(a). The ICC found that:

> [T]he Commission has no jurisdiction over the matters raised by complainant and that section 10701(a) was not intended to give the Commission jurisdiction for "unreasonable practices" of the nature alleged in the complaint. The dispute between these two parties is a private matter and must be resolved elsewhere.

Id. at 47,612. Commissioner Strenio, concurring in *Atlas*, further cautioned that if this behavior becomes pervasive "findings and recommendations" should be forwarded to "Congress for appropriate legislative relief." *Id.* at 47,612. The result and rationale used by the ICC in 1985 is completely opposite to what the ICC now states in *Negotiated Rates I & II.*

The purpose of the strict enforcement of tariffs is to prevent shippers from obtaining secret discounts from carriers. "This goal would be subverted if a shipper and carrier could by agreement change the terms of the applicable tariff rate." *Western Transp. Co. v. Wilson & Co., Inc.*, 682 F.2d 1227 (7th Cir. 1982), (citing S.Rep. No. 46, 49th Cong. 1st Sess., at 200 (1886)). The ICC's assertion that under some circumstances the published tariff may be changed by private agreement is at best inconsistent with the statutory purpose. Similarly, to make the carrier's obligation to collect the full tariff rate an unreasonable practice because of the existence of private agreements between the shipper and carrier is contrary to the ICC's statutory authority. 49 U.S.C. Section 10101(a)(4) and 49 U.S.C. Section 10761(a).

To allow the ICC to find that some shippers and common carriers can charge a rate other than that contained in a published tariff would at the least "remove the teeth" from 49 U.S.C. Section 10761(a), and at worst render it a nullity. Moreover, since a negotiated rate is never filed it is free from scrutiny under 49 U.S.C. Sections 10708(a)(1) and 11701(a).

Amici has appended a list of decisions rendered by the ICC under *Negotiated Rates I & II* (Appendix "A" hereto). In each and every case the ICC found the existence of a "negotiated rate" and relieved the shipper of its obligation to pay the full tariff charges sought. In fact, in only four cases was the shipper required to pay any undercharges. In all of the cases appended undercharges in the amount of $3,145,263.70 were waived by

the ICC. In contrast shippers where obligated to pay a mere $6,557.55. Thus, by dollar amount the ICC has allowed 99.79% of all unfiled charges to take precedence over the carrier's filed rates. Amici assert that the ICC with its boilerplate analysis of "negotiated rates" has completely emasculated the requirement of 49 U.S.C. Section 10761(a).

To illustrate the ease of proving and the perfunctory acceptance of the *Negotiated Rates* criteria the case of *MCI Telecommunications Corp. v. E.L. Murphy Trucking Company*, 1990 Fed. Carr. Cas. (CCH) para. 37,772 at 47,014 (ICC 1989) is brought to this Court's attention. In *MCI* the motor common carrier was denied, by the Commission, the opportunity for oral hearing to allow cross examination of the two witnesses who, through written statements, supported the negotiated rates finding. In fact, the Commission has never allowed an oral hearing in a negotiated rates case. This is the caprice or fiction that the Commission has created, under the *Negotiated Rates* policy, for a consistent pro-shipper finding.

The ICC's total disregard for the filed rate doctrine is best illustrated by Chairman Gradison's remarks at the Hearing on *Negotiated Rates II* when she stated; "I'm of the opinion that with the 75 to the 100 cases we've issued, though they have been referred to us by the courts, this agency has never seen a negotiated rate it didn't like." Hearing on *Negotiated Rates II*, remarks of Chairman Heather J. Gradison at 23 (May 2, 1989) (Appendix "B" hereto at 19a).

Although claiming that *Negotiated Rates I & II* are a limited response and not a universal rule, the ICC has created a fiction by stating that other provisions of the Motor Carrier Act will aid to eliminate any transgressions that the *Negotiated Rates* policy does not cure. As stated by the Solicitor General in the brief submitted in support of granting certiorari in this case:

> Nor does the ICC's policy transgress other provisions that support the filed rate requirement. See Pet. 20. The Act creates civil liability for a shipper's knowing receipt of a rebate (49 U.S.C. 11902) and criminal liability for the knowing provision or receipt of transportation at below-tariff rates (49 U.S.C. 11903). A shipper that violates those provisions by *knowingly* paying an unfiled rate would be barred from taking advantage of the Commission's *Negotiated Rates* policy (because reliance on the applicability of the negotiated rate must be reasonable). A carrier that violates those provisions is hardly in a position to complain if it is later denied the windfall of a higher tariff rate that exists only because it ignored its duty to make a timely filing.

Brief of Federal Respondent at 8, n.4.

Despite these words of enforcement might the sad fact is that since the ICC's first expression of its *Negotiated Rates* policy in 1986 there has *not* been one shipper or carrier who has been charged civilly or criminally under either 49 U.S.C. Section 11902 or 49 U.S.C. Section 11903. The ICC's rhetoric is like a policeman who does not police complaining of the high crime rate.

What is most distressing to Amici is that the ICC seeks a remedy that is not statutorily authorized but that is alleged to be administratively needed. However, the ICC is endowed with the ability to impose civil and criminal fines, neither of which has been utilized, to stem the tide of negotiated rates and satisfy the perceived need. *See* 49 U.S.C. Sections 11901(b), 11914(b). Any additional remedial power should be sought from Congress—it is not up to the Commission to rewrite the law.

D. Simple Tenets Of Statutory Construction Strongly Support The Viability Of 49 U.S.C. Section 10761(a)

The ICC's decisions in *Negotiated Rates I & II* are inconsistent with rules of statutory construction and act to make 49 U.S.C. Section 10701(a) nullify 49 U.S.C. Section 10761(a). Normally, the rule that the specific

statute controls the general statute applies to statutes in different acts. 2A N. Singer, *Sutherland Statutory Construction*, Section 51.05 (4th ed. 1985). However, the rule makes sense in this situation because the filed rate statute is a specific key rule in the regulatory scheme. Congress has given the ICC authority to regulate carrier practices, but Congress itself has enacted a controlling law—that the filed rate controls.[4]

In *R.C.C.C., supra*, 793 F.2d at 379, the United States Court of Appeals for the District of Columbia Circuit held that the ICC could not allow freight forwarders to operate under a filed tariff which was no tariff at all because shippers and carriers could not calculate rates based on a tariff. The Court of Appeals reasoned that this waiver of the filed rate requirement was beyond the ICC's authority because the filed rate requirement is central to the Interstate Commerce Act and the Act itself did not give the ICC specific authority to waive the requirement. The ICC under its general regulatory power cannot change a key rule established by statute. *Texas & Pacific Ry. v. ICC*, 162 U.S. 197 (1896).

Without question the filed rate requirement is a key part of the regulatory scheme. It is set by a specific statute, and the statute itself does not expressly give the ICC authority to vary the filed rate requirement. Thus, the ICC's general power to determine the reasonableness of carrier practices cannot give it authority to declare collection of the filed rate an unreasonable practice.

Throughout the entire history of the Interstate Commerce Act the obligation to file tariffs was supported by the harsh consequences for failure to do so. Given the apparent ease of proving a "negotiated rate", no shipper or carrier need fear an undercharge or overcharge claim.

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[4] This rationale is equally true where the ICC alleges that the window of opportunity for allowing 49 U.S.C. Section 10701(a) to vitiate 49 U.S.C. Section 10761(a) is derived from the transportation policy found at 49 U.S.C. Section 10101.

No matter how desirable the ICC or the courts find this outcome, it is solely Congress' prerogative to alter the statutory scheme of the Interstate Commerce Act.

E. *Seaboard* Has Been Misapplied By The ICC And The Eighth Circuit And Does Not Permit Waiver Of The Undercharges

The Eighth Circuit in *Maislin* and the ICC in its *Negotiated Rates* decisions have used *Seaboard System R. Inc. v. United States*, 794 F.2d 635 (11th Cir. 1986) as the cornerstone for departure from past strict application of 49 U.S.C. Section 10761(a). In *Seaboard*, which involved a direct complaint filed with the ICC, the Commission ordered the waiver of a railroad's undercharges due to the confusing nature of the tariff involved. *Seaboard* is readily distinguishable and plainly in opposition to the facts presented here for several reasons.[5]

First, *Seaboard* was a rail case and the ICC's jurisdiction differs as it relates to rail and motor carriers. *Compare*, 49 U.S.C. Section 10704(a)(1) and 10704(b)(1). The ICC has jurisdiction to waive rail undercharges, but not motor carrier undercharges. *See Negotiated Rates I, supra*, 3 I.C.C. 2d at 102. *Negotiated Rates II, supra*, 5 I.C.C. 2d at 625. This is a significant difference with the situation in *Seaboard*, where a rail carrier was involved. A shipper's remedy for motor carrier undercharges is to pay the rate and file a civil action for reparations pursuant to 49 U.S.C. Sections 11705(b)(3) and 11706(c)(2). *Supreme Beef, supra*, 864 F.2d at 391.

Second, *Seaboard* arose from a complaint proceeding before the ICC and not from a court referral. Consequently, the Eleventh Circuit was not being asked to accept or reject an advisory opinion. As the *Seaboard*

[5] *Seaboard* did not involve a negotiated, unpublished rate versus a tariff rate. Rather, "[t]he controversy reflects a somewhat unclear *published* tariff." 794 F.2d at 636 (emphasis supplied).

court stated, it could *not* recognize an equitable defense. 794 F.2d at 638.

Finally, *Seaboard* held that the tariff terms were not plain to the ordinary user. 794 F.2d at 638. Therefore, the Eleventh Circuit concluded that the ICC's decision did not abrogate the requirement of 49 U.S.C. Section 10761.

Here, the Eighth Circuit upheld the district court's judgment, after referral to the ICC, that the collection of the filed rate would be an unreasonable practice. Relying on *Negotiated Rates I*, *Seaboard* and *Western Transp. Co. v. Wilson & Co., supra*, the Eighth Circuit upheld the ICC's jurisdiction to not only find that a practice contained in a filed tariff may be unreasonable (*Seaboard* and *Western* holdings), but, going one step further, that the collection of the filed rate can be an unreasonable practice when shipper and carrier have negotiated an unfiled rate. This is clearly a strained judicial reading given the factual predicates in *Seaboard* and *Western*. The practices found to be unreasonable in *Seaboard* and *Western* were contained in filed tariffs, whereas in *Maislin* the collection of the filed tariff rate was deemed an unreasonable practice. Moreover, in *Seaboard* and *Western* the rate ultimately enforced was a filed rate, but in contrast in *Maislin* no filed rate was enforced. Thus, the cases relied upon in *Maislin* are inapposite to the decision.

The Eighth Circuit would have one believe that any time the specter of unreasonableness is raised a court must refer the issue to the ICC. To buttress this assertion, the Eighth Circuit cites, *United States v. Western Pacific R. Co.*, 352 U.S. 59 (1956), as the basis for Supreme Court authority that a determination of reasonableness of a rate or practice must be made by the ICC under the doctrine of primary jurisdiction.

The Eighth Circuit fails to state that the Court in *Western Pacific* was dealing with rates and practices

found *in* a filed tariff, not an unfiled negotiated rate or practice. In *Nader v. Allegheny Airlines, Inc.*, 426 U.S. 290, 304 (1976) (emphasis supplied), this Court stated that the doctrine of primary jurisdiction applies:

> [W]hen an action otherwise within the jurisdiction of the court raises a question of the validity of a rate or practice included *in* a tariff filed with an agency, e.g., *Danna v. Air France*, 463 F.2d 407 (2d Cir. 1972); *South Western Sugar & Molasses Co. v. River Terminals Corp.*, 360 U.S. 411 (1959).

Similarly, in *Western Pacific* the reasonableness of a tariff and tariff construction as applied was the specific issue being referred, not a negotiated unfiled rate or practice. The Court in *Western Pacific* was concerned with a practice found *in* a filed tariff.

Additionally, this Court in *Nader* observed:

> For example, if respondent's overbooking practices were detailed *in* its tariff and therefore available to the public, a court presented with a claim of misrepresentation based on failure to disclose need not make prior reference to the Board, as it should if presented with a suit challenging the reasonableness of practices detailed *in* a tariff. Rather, the court could, applying settled principles of tort law, determine that the tariff provided sufficient notice to the party, who brought the suit—as, indeed, petitioner suggests it would.

Nader, 426 U.S. at 306, n.14 (emphasis supplied).

The ICC relies upon *Hewitt-Robins, Inc. v. Eastern Freight-Ways, Inc.*, 371 U.S. 84 (1962) to allow it to determine that a carrier's action to collect the filed rate may be incompatible with the reasonable practice provision of the Interstate Commerce Act. However, the ICC's reading of *Hewitt-Robins* could not be more strained than in this instance. *Hewitt-Robins* involved misrouting practices and, therefore, the concerns underlying the filed rate doctrine were not present. Indeed, this Court in *Hewitt-Robins* specifically noted its holding was directed at questions of misrouting when it stated

"here the challenge is not at the reasonableness of the rates, but at the carrier's misrouting practice. The question, therefore, is not one of rates but of routes." *Hewitt-Robins*, 371 U.S. at 87. The rate ultimately applied was a filed rate, the routing distinction only determined whether it would be an interstate filed rate or an intrastate filed rate.

Moreover, *Maislin* in effect eliminates the need for a carrier to file rates by elevating oral agreements to the level of filed tariffs. By allowing 49 U.S.C. Section 10701(a) to take precedence over 49 U.S.C. Section 10761(a) the Eighth Circuit has overturned legislation and legal precedent that has controlled this issue for the last eighty years. This type of judicial activism is inappropriate given the fact that Congress has spoken recently in the Motor Carrier Act of 1980 and did not alter 49 U.S.C. Section 10761(a).

CONCLUSION

Section 10761(a) is, from a statutory and *stare decisis* standpoint, a crucial element of our national transportation policy. It enables shippers and carriers to move freight at specific rates in a fashion that not only gives notice to all but forms the foundation of our transportation policy, anti-discrimination. The viability of this statutory provision should be affirmed, and the determination of the Eighth Circuit should be reversed.

Respectfully submitted,

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March 2, 1990

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APPENDICES

APPENDIX A

Title		*Waived* *	*Allowed*
MCC 10961	Primary Steel, Inc. v. Maislin Industries, U.S., Inc.	$187,923.26	
MCC 10962	TMBR Drilling, Inc. v. Younger Transportation, Inc.	$ 31,500.00	
MCC 10991	Wakefern Food Corporation v. Southwest Freight Lines, Inc.	$ 27,003.26	
MCC 30005	Soveriegn Oil Company v. Dependable Cartage and Transp.	$500,000.00	
MCC 30015	Freeman Producta, Inc. v. Rebel Motor Freight, Inc.	$148,830.44	
MCC 30019	Motor Carrier Audit & Coll. Co. v. Baldor Electric Comp.	$ 16,664.01	1,772.01
MCC 30030	Packerland Packing Company, Inc. v. Maislin Industries U.S., Inc.	$ 4,399.79	400.12
MCC 30032	Breman's Express Company v. Mitchell Milling Co., Inc.	$ 15,731.00	
MCC 30034	Don Fisher Sales Company v. Genco Trans. Services, Inc.	$235,677.28	
MCC 30055	Delta Traffic Services, Inc., RTC Transp., Inc. v. Commercial	$ 15,920.39	
MCC 30061	Hiram Walker & Sons, Inc. v. (Tobler)	$ 78,874.69	
MCC 30062	American Industries, Inc.	$ 5,328.90	
MCC 30076	Ottawa, Strong & Strong, Inc. v. Tobler Transfer., Inc.	$383,140.00	
MCC 30077	Fleming Potter Company, Inc. Morton Metalcraft Co., Baldor	$108,000.00	

* The amounts *Waived* may well be understated as many of the ICC proceedings combine a number of individual cases and do not always state the entire amount of undercharges waived. However, Amici believe the amount *Allowed* is accurate because the ICC specifically indicated what freight bills were allowed.

Title		*Waived*	*Allowed*
MCC 30079	Johanson Transportation Service	$ 5,006.07	
MCC 30080	Branch Motor Express Company v. Ampad Corporation	$ 58,321.20	
MCC 30081	Orval Kent Food Company, Inc.	$ 8,058.41	
MCC 30083	Rubbermaid Incorporated v. Delta Traffic Service, Inc.	$ 22,558.61	
MCC 30084	Delaware Valley Shippers Asso.	$ 14,105.79	
MCC 30088	Royal Oak Enterprises v. Professional Truck Auditing	$ 8,961.77	
MCC 30095	General Mills, Inc. v. Tobler Transfer Company	$121,844.29	
MCC 30096	Delta Traffic Service, Inc. v. Star Bronze Co.	$ 4,992.47	
MCC 30099	AP Industries, Inc.	$ 23,707.81	
MCC 30100	Ottawa Strong & Strong, Inc. v. Tobler Transfer, Inc.	$229,629.44	
MCC 30106	Motor Carrier Audit & Coll. Co. v. Fisher Mills (West)	$ 68,308.41	
MCC 30107	Carlyle Johnson v. Savage Brothers, Inc.	$ 62,415.50	
MCC 30108	Oneida Motor Freight, Inc. v. Fort Howard Cup Corp.	$ 26,951.00	
MCC 30109	Delta Traffic Service, Inc. v. KR Newsprint Co., et al.	$ 37,350.00	
MCC 30110	Stanek Distributing Co., Inc. v. Oran Paul Yates & Cora Yate	$ 14,566.00	
MCC 30112	Georgia Freight Bureau, Inc. v. Delta Traffic Service, Inc.	$ 1,430.46	
MCC 30115	MCI Telecommunications Corp. v. E.L. Murphy Trucking Co., et al.	$ 37,875.66	
MCC 30116	Navistar International Corp. v.	$ 21,878.59	
MCC 30122	Dixie Riverside, Inc. et al. v. Delta Traffic Service, Inc.	$137,644.03	

Title		*Waived*	*Allowed*
MCC 30124	Titan Transport, Inc. v. The Pillsbury Company	$ 23,280.00	
MCC 30127	Farrell Calhoun Paint Co., Inc. v. Rebel Motor Freight, Inc.	$ 8,977.85	
MCC 30130	Sunwise Corporation v. RTC Transportation, Inc.	$ 26,633.88	$3,237.46
MCC 30134	Thomas J. Lipton, Inc. v. Campbell 66 Express, Inc.	$ 2,673.00	
MCC 30136	Midwest Drywall Company Inc.	$ 11,176.73	
MCC 30137	B&B Beverage Co. v. Eazor Special Services, Inc.	$ 5,471.18	
MCC 30139	Ideal Chemical and Supply Co. v. Rebel Motor Freight	$ 2,076.18	
MCC 30140	Sunshine Mills, Inc. v. Rebel Motor Freight, Inc., et al.	$ 6,007.60	
MCC 30144	Mid Florida Mining Company	$ 12,860.02	
MCC 30148	Falcon Transport, Inc. v. Delta Traffic Service, Inc.	$ 16,534.23	
MCC 30150	Delta Traffic Service, Inc., RTC Transp., Inc.—(Hormel)	$ 10,805.23	$1,147.96
MCC 30152	Willbanks Steel Corp. v. The Equaw Transit Company et al.	$ 12,409.86	
MCC 30156	Ormand Shops, Inc. v. Oneida Motor Freight, Inc.	$ 54,369.41	
MCC 30159	Milwaukee Electric Tool Corp.	$ 96,031.13	
MCC 30085	Alex Foods v. RTC	$ 90,000.00	
MCC 30087	Goodmark Foods v. Delta Traffic	$ 9,106.73	
MCC 30078	Meyer Products Div., Louis Berkman Co. v. Spector	$ 70,249.14	
MCC 30075	Ford Howard Paper Co. v. West Coast Truck Liwes	$ 22,003.00	
	Total	*Waived*	*Allowed*
		$3,145,263.70	$6,557.55

APPENDIX B

BEFORE THE UNITED STATES INTERSTATE COMMERCE COMMISSION

Ex Parte No. MC-177

NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE—
PETITION TO INSTITUTE RULEMAKING OF NEGOTIATED
MOTOR COMMON CARRIER RATES

No. MC-C-30090

NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE—
PETITION FOR DECLARATORY ORDER ON NEGOTIATED
MOTOR COMMON CARRIER RATES

Hearing Room A
12th & Constitution Ave., N.W.
Washington, D.C.

Tuesday, May 2, 1989

The VOTING CONFERENCE in the above-entitled matter was convened, pursuant to notice, at 10:02 a.m.

[2]

BEFORE:

HEATHER J. GRADISON, Chairman
JOSEPH J. SIMMONS, III, Vice Chairman
PAUL H. LAMBOLEY, Commissioner
FREDERIC N. ANDRE, Commissioner
KAREN BORLAUG PHILLIPS, Commissioner
NORETA R. MCGEE, Secretary

APPEARING BEFORE THE COMMISSION:

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[3] PROCEEDINGS

[10:02 a.m.]

CHAIRMAN GRADISON: Good morning, ladies and gentlemen. This is the time and the place set by the Interstate Commerce Commission to hold an open special conference on MCC-30090, National Industrial Transportation League Petition for Declaratory Order on Negotiated Motor Common Carrier Rates and Ex Parte MC-177, National Industrial Transportation League Petition to Institute Rulemaking on Negotiated Motor Common Carrier Rates.

The purpose of this conference is for the members of the Commission to discuss among themselves the Commission's options concerning the NIT League's request that the ICC issue a declaratory order finding that it is an unreasonable practice and thus a violation of the Interstate Commerce Act for a motor common carrier to conduct business on the basis of a negotiated and

agreed to rate while failing to publish that rate in an effective tariff on file at the Commission.

In this context, the Commission will discuss its negotiated rates policy generally and will specifically consider whether to modify and or clarify that policy, as it's now described in Ex Parte MC-177, by adopting the NIT League's proposal or taking some other action. The Commission will then vote on these agenda items.

Today we again must address the appalling situation [4] where carriers agree to charge certain rates but fail to publish these negotiated rates and tariffs and thereafter attempt to force shippers to pay the higher rates set forth in their published tariffs. The practice is doubly reprehensible since it can occur only because of the legal requirement that the rate collected by a common carrier must be filed in a tariff.

While the Commission's negotiated rates policy statement and its handling of cases pursuant to that policy have helped some shippers to defend themselves against these practices, we are here today to explore ways in which the Commission may more effectively be of assistance in these matters.

I'd like to thank Commissioner Phillips who has at my request coordinated activities in preparation for today's open conference. I'd like to call on Director Jane Mackall for opening remarks. Director Mackall.

MS. MACKALL: Good morning, Madam Chairman. With me this morning at the table are on my left general counsel Bob Burk and on my right, deputy director of the motor section, Richard Felder.

In 1986, the Commission issued its policy statement on Ex Parte No. 177 to deal with the developing problem involving undercharge suits filed in the courts.

These suits typically filed by trustees for bankrupt [5] carriers or their agents sought to collect tariff rates from shippers who had previously negotiated and paid lower rates that were never published in a tariff. The

policy statement limits Commission action to cases referred by a court.

Under the policy statement, the Commission decides whether under all the revelant circumstances, collection of the undercharges would be an unreasonable practice. Armed with the Commission's unreasonable practice finding, the shipper can seek to avoid payment of added charges based on the otherwise applicable tariff rate. To date, the Commission has received close to 100 cases.

The rulings have been in favor of the shippers in cases decided on the merits. In each of those cases, the Commission determined whether there was a negotiated but unpublished rate, whether negotiations were held with and the rate was quoted by, a responsible carrier official and whether the shipper reasonably relied on the rate quotation.

With all of these elements proven, the Commission determined that collection of any unreasonable charges based on the tariff—additional charges based on the tariff rate would be an unreasonable practice. As General Counsel Burk will explain after my statement, neither the 177 policy statement nor your implementation of it has removed the burden from the shipping community.

Shippers are still being presented with balance due [6] bills and questions have been raised about the policy statement's requirement for a court referral before a negotiated rate complaint can be instituted. In addition, calling the negotiated rates decision advisory in the 177 statement has caused confusion. Because that statement had offered in insufficient relief, the NIT League filed another petition for a declaratory order this time seeking a somewhat different finding.

The Commission published notice of the petition under Docket MC-C-30090, gathered comments, but then held the matter in abeyance at the petitioner's request pending a coordinated shipper-carrier effort to secure legislative

relief. When a legislative solution failed to materialize, NIT League sought expedited action.

The purpose of this conference is to discuss what further action the Commission should take to implement its continuing policy that when a negotiated rate is billed and paid; the shippers should not be liable for anything more.

You have before you an options paper addressing the key issues. This concludes my opening remarks and we'll be happy to answer any questions you have but before that, Bob has an opening statement.

MR. BURK: Madam Chairman, Mr. Vice Chairman, Commissioners. I would like to present a brief statement this morning from our perspective in the litigation we are faced [7] with in the courts.

In the wake of the Commission's decision in Ex Parte No. MC-177, two lines of court cases have developed. In the first, courts are doing what the Commission had hoped when faced with an undercharges suit involving unfiled negotiated rates. In the second line, they are not.

Representative of the first line is the case of James B. Orr ad Highway Express v. I.C.C. in the western district of Tennessee. In that case, Orr filed suit for undercharges based on the difference between the negotiated rate and the filed rate. The court ordered referral to the Commission on the motion by the shipper for consideration of whether collection of undercharges would be an unreasonable practice.

Commission found it would and that decision was returned to the court for review. The Orr court found, "It is undisputed that the question of whether certain acts constitute unreasonable practices is within the I.C.C.'s primary jurisdiction."

Upon review of case law, the MC-177 rationale, the court further found no abrogation or even undercutting of the filed rate doctrine. The court applied the ABA arbitrary and capricious standard to the Commission's decision, upheld it and denied the suit for undercharges

as moot in view of the finding of an unreasonable practice by the Commission.

The Orr decision is presently on appeal to the 6th [8] Circuit and our brief is due on May 31st.

The decision on Motor Carrier Audit and Collection Co. v. United Food Service exemplifies the other line of cases. There is similar circumstances as Orr, the shipper moved pursuant to Ex Parte MC-177 to refer the issue of unreasonable practice to the Commission. The court refused to do so. The court interpreted MC-177 as follows, "The I.C.C. has offered to provide the court nonbinding advisory opinions as to whether under the circumstances presented it would be unreasonable to collect an undercharge."

On that interpretation, the court went on to state, "While the I.C.C. may still advise a court, it is difficult to understand how in the light of a clear precedent establishing that equitable expenses are not generally available, a court should adopt the I.C.C.'s recommendation that a defendant be allowed to assert those defenses."

So what we have are two diametrically opposed readings by the courts as to the nature and effect of the Commission's negotiated rate policy statement. Simply put, the issue before you today is whether to issue a clarification of that policy statement to make clear that the Orr court's view is correct and to remove any basis in the present Commission language for court's to reach the conclusion in the Motor Carrier Audit court.

I am sure you are aware of the importance of acting [9] now. Already 45 cases in district courts have resulted in refusals to refer to the Commission. Over 75 cases have been referred to the Commission and your decisions on those referrals will be reviewed by the courts.

Appeals to circuit courts now exist in the 2nd, 6th, 7th, 8th and 9th circuits.

If you agree as I believe was your intent with the Orr case reasoning, you go now to clarify your policy on

negotiated rates will be enormously helpful to the successful outcome of this litigation. Thank you, and I'm available for any questions you may have.

CHAIRMAN GRADISON: Thank you. Commissioner Phillips, I wonder if you'd take over at this point.

COMMISSIONER PHILLIPS: Thank you very much, Madam Chairman. As was mentioned, Chairman Gradison asked me to coordinate the Commission's efforts to establish a framework for discussing potential Commission action with respect to negotiated rates. In effort to develop a consensus on what further steps the Commission should take in this area, I have conferred individually with each of my colleagues.

I am pleased to report that we have identified several options, we have considered the Commission's experience to date under the existing interpretation of our MC-177 policy, the treatment of these cases by the courts, and the comments of the parties in [10] MCC-30090. My colleagues and I agree that further Commission action is needed.

We have identified six options. Before we discuss and vote on them, I would like to describe briefly each of these options. I believe that a consensus exists for the first four options. On the fifth option, dealing with the Commission's disposition of the NIT League's declaratory order petition, there now appears to be a difference of opinions among my colleagues.

Likewise, a consensus has not yet been reached on a sixth option, which concerns procedures by which the Commission would implement any decision taken here today. Despite the fact that we have not reached a consensus, the level of interest expresed by my colleagues on the sixth option made it desirable to include it for discussion.

The first option we have identified is to reopen on our own motion Ex Parte No. MC-177 for further clarification and enunciation of our policy regarding negotiated rates cases. As Director Mackall and General Counsel

Burk have pointed out, since our 1986 decision in Ex Parte MC-177 and subsequent clarifying decisions, the Commission has gained experience with negotiated rates cases. The Commission, as well as the courts, have decided a number of these cases.

This process has served to identify several areas in which the policy enunciated in MC-177 may require clarification [11] and strengthening. One of these areas, which General Counsel Burk has clearly described, is the split among the courts over the propriety of referring negotiated rates cases to the Commission. The split seems to stem, at least in part, from some misinterpretation of the Commission's statement in MC-177.

In that case, the Commission stated that it would provide advisory opinions on negotiated rates cases referred to us by the courts. Reopening MC-177 would permit the Commission to address this misinterpretation and to strengthen the policy outlined in MC-177. It would also allow us to establish primary jurisdiction over negotiated rates cases. Reopening MC-177 would also permit us to clarify other areas of our MC-177 policy, including whether the Commission will accept negotiated rates cases for decision without prior referral by the courts, and whether those cases should continue to be handled on a case by case basis.

If the Commission votes to approve the reopening of MC-177, our second option is to clarify that the Commission's opinions in negotiated rates cases will represent the exercise of its primary jurisdiction and thus are binding and only subject to judicial review under the "arbitrary and capricious standard."

This option is intended to address the split among the courts identified by the General Counsel and to strengthen the legal posture of shippers who seek to rely on the [12] Commission's MC-177 policy in obtaining relief in negotiated rates cases.

The third option we have identified is for the Commission to amend the policy outlined in MC-177, to permit Commission consideration of negotiated rates cases with-

out court referral. The purpose of this proposal is to provide an additional procedure by which shippers faced with potential undercharge claims could seek relief.

Under this procedure, a shipper who is notified of possible liability for undercharges claimed by a motor carrier could seek a declaratory order from the Commission determining whether collection of the alleged undercharges would be an unreasonable practice, even if the carrier had not instituted court proceedings.

The goal of this option is to encourage resolution of negotiated rates cases before cases are filed in the courts, to encourage private resolution during the pendency of cases that are filed, and to simplify those negotiated rates cases that do proceed to adjudication in the courts. This proposal is consistent with the Commission's authority under the Administrative Procedure Act; that is, to issue declaratory orders in order to terminate controversies or to remove uncertainties.

The fourth option is whether the Commission should continue to handle negotiated rates cases on a case by case [13] basis. In MC-C-30090, the NIT League and others have urged the Commission to adopt a declaratory order declaring in general terms the circumstances when the collection of alleged undercharges would constitute an unreasonable practice.

The NIT League's proposed solution offers a seemingly straightforward approach to negotiated rates cases. If adopted, however, it would leave the factual determination as to whether any particular set of facts amounts to an unreasonable practice to the courts.

In effect, the Commission would be called upon to exercise its expertise in determining what constitutes an unreasonable practice in only a generalized way. Therefore, it is not clear whether this approach would resolve the split among the courts as to the appropriate resolution of negotiated rates cases. Nor is it clear that this approach would be sufficiently persuasive to a court to increase the probability that a shipper making the types

of showings required by such a declaratory order would prevail.

For this reason, I believe there is sentiment among most Commissioners to continue to handle negotiated rates cases on a case by case basis. If the Commission votes to reopen and clarify Ex Parte No. MC-117, and to continue to handle negotiated rates cases on a case by case basis, a fifth option for the Commission's consideration is whether the petition in MCC-30090 should be held in abeyance for further consideration [14] based upon shipper, carrier and Commission experience following implementation of the initiative adopted by the Commission here today.

As I mentioned, the proposal for a declaratory order in MCC-30090 is a valid response to recent developments in negotiated rates cases. Accordingly, I do not believe that there is a consensus among my colleagues to deny the petition. As of last Friday afternoon when I circulated the voting sheet now before the Commission, there appeared to be a consensus in favor of holding the NIT League petition in abeyance at this time.

I have since been made aware that this is in fact no longer the case. However, it appears that there is a majority that believes that continued use of the case by case procedure may be more effective in obtaining favorable judgments in negotiated rates cases. By holding the petition in MCC-30090 in abeyance, the Commission will be able to assess the progress made under the policies we adopt here today and to reconsider adoption of the MCC-30090 petition if it appears desirable in the future.

The sixth option, also on which consensus has not been reached, concerns the mechanics of the Commission's implementation of the decisions we take today. Under current procedures, the negotiated rates case docket has been handled expeditiously by the Commission's Office of Proceedings. [15] However, if the Commission adopts the five options I just outlined, the potential exists for a greatly expanded case load.

Under this option, the Offices of General Counsel, Proceedings and Hearings would be directed to develop a docket management plan for the Commission's handling of future negotiated rates cases. This option is not intended to establish a burdensome new procedure for the handling of negotiated rates cases, or lead to the creation of new evidentiary requirements.

Rather, it is intended to ensure continued expeditious handling of these cases, regardless of the volume of cases received and to encourage the best use of Commission resources, including administrative law judges in meeting this goal. Thank you, Madam Chairman.

CHAIRMAN GRADISON: Thank you, Commissioner Phillips. Are there opening statements by any individual members of the Commission? Commissioner Lamboley?

COMMISSIONER LAMBOLEY: I guess I would be next. I want to—thank you, Madam Chairman. I want to commend Commisisoner Phillips for the energy and consideration she's given to the problems that have been visited on the industries following our adoption of MC-177. I think that Commissioner Phillips has demonstrated considerable imagination and thoughtfulness in approaching the variety of problems and the [16] various options that one could consider as appropriate.

In this case, I think that for my own part, I'd feel very comfortable in voting yes for all of the options and I'll briefly say why. I think it's obviously important for us to reopen and clarify MC-177 to do three things at the outset. First, make clear that our claim to jurisdiction is one of primary, if not exclusive, jurisdiction for the purpose of interpretation of the Interstate Commerce Act provisions as it relates to unreasonable practice.

Secondly, to remove from the procedural requirement, the court referral, which I believe has been a barrier in some measure, to having cases filed here initially. Thirdly, I believe that if we proceed in appropriate fashion, the courts will accord to us as having done our

primary jurisdictional responsibilities in such a way that the judicial review under ordinary standard would be accorded to our decisions.

I think further that we should continue to handle the cases on a case by case basis, and I feel comfortable that we should perhaps hold in abeyance the MCC-30090 for the purpose of being able, as Commissioner Phillips pointed out, to get a better sense of what now is happening as those cases would be developing before us, and not as cases developed in judicial forums, because they develop in different ways and sometimes non-transportation elements become more critical than the transportation elements, which are our responsibility.

[17] I think it would be advisable, and I would suggest, and attempt to urge my colleagues that we consider holding the NIT League petition in abeyance for the reason that we could bring the information more current in a period of six to nine months, would be a benchmark of time that I would have in mind in which to perhaps make an assessment then of what we've got in terms of the cases that have been filed, and the dispositions of the cases and the issues that have been joined by initial pleadings in proceedings before the Commission.

I think after that period of time, if it's possible, it might very well be that we adopt a policy statement along with a procedural companion provision which would suggest that if you meet the criteria of the policy statement, that an initial pleading demonstrating that might entitle the applicant who files the complaint or the petition to immediate relief, without much further, unless it is contested, on any serious and factual dispute in any way.

Now that's simply my general view as to the NIT League petition, which I think raises a number of critical issues. Based upon the experience that has been going on in judicial forums, I think however it's incumbent upon us in addition to the experience of judicial forums, to develop our own experience before we make an ulti-

mate decision about what a declaratory statement might be. But I do think that down the road, we might very well be able to visit and visit it far more [18] responsibly.

Finally, I think that what is offered in the suggestion of item number 6 is simply working through a procedural mechanism by which if there is a concern that we may be flooded with a large number of cases on the initial filing, that we have a procedure in place in which we can manage the docket and move them promptly and expeditiously.

We have recognized in the past that many of these have been fact-bound cases, and in those instances where it does appear to be fact-bound, it seems to me that there is an easy and efficient way of developing the record. Bundling some cases, which no doubt may come in from what the court records reflect. Frequently, there is a single carrier but a multiplicity of similarly situated claims that are involving a number of shippers, but only one carrier. I think it's quite possible to work out a scheme of docket management and control to handle all of those in a meaningful way.

Plus, giving the people who are able to develop the pattern early on, the opportunity to indicate that the carrier's circumstances may be more repetitive than perhaps fact-bound in subsequent cases. For that reason, I think it's incumbent, and wholly appropriate, that we develop the appropriate mechanism and I think the office of Proceedings and the Office of Hearings and the General Counsel's office are very capable of developing that. [19] I would make one final observation, and that is the Office of Hearings has in cases in which we've had, some difficult times in developing the record. It's performed quite admirably and I think it's terribly important that it not become a forum, if you will, to extend time limits, to otherwise be dilatory or otherwise create a paper record of size and volume beyond the circumstances.

I would point out that in such cases as the Santa Fe Southern Pacific divestiture of the SP, the ALJ's office was terribly important in developing the record on that as well as with the investigation into the Trailer Train question and a number of other cases. I've been quite pleased with respect to the docket management and control that the Chairman has requested under the rate cases.

The Office of Hearings has been more than able to bring those cases to fruition, at least to the point where the parties' negotiations are tracking along with the procedural schedule, in which disposition is ultimately going to be made. In short order, what that does is keep people's feet to the fire and it keeps them focused on the issues and doesn't let the cases wander. I think that's a terribly important ingredient of it. Thank you, Madam Chairman.

CHAIRMAN GRADISON: Thank you, Commissioner Lamboley. Commissioner Andre, do you have any remarks you'd like to open with?

[20] COMMISSIONER ANDRE: Yes, Madam Chairman. In October of 1986, the Commission in Ex Parte No. MC-177 issued a policy statement which established that shippers could assert equitable defenses in undercharge cases, and that if the shipper could also show that the carrier engaged in an unreasonable practice, the ICC would determine that the undercharge claim did not have to be paid.

At that time, it was my hope that the issuance of that policy statement would alleviate the problems that shippers were facing. However, it is becoming increasingly clear that the problem has not been resolved. Over 75 cases, perhaps approaching 100, involving approximately $10 million have thus far been referred to the ICC and the Commission has favored the shipper in almost every one of these cases.

Unfortunately, many courts have refused to follow our ruling and there are thousands of other cases which have

either been voluntarily settled, tried and lost, or are currently pending. It is estimated that the shipping community is facing up to $30 million in alleged undercharge bills.

It is my view, a view which I believe the majority supports, that there are two aspects of the Ex Parte No. MC-177 policy which have created this confusion. The first is the requirement of court referral and the second is the language of our decisions which implies that our decisions are merely advisory.

[21] Accordingly, I propose that Ex Parte No. MC-177 should be clarified to incorporate the following three points. Number one, that the Commission will exercise primary jurisdiction under the unreasonable practices provisions of the Interstate Commerce Act. Number two, that the Commission will eliminate the requirement of court referral and number three, that the decisions will no longer be characterized as advisory.

While there are certainly other ancillary issues which need to be resolved, our purpose today should not be to place blame, point fingers or take credit, but rather our purpose should be to sit down, discuss these aspects, reach a consensus, resolve the problem to the best of our ability, and produce a new policy statement reflecting that consensus. Thank you, Madam Chairman.

CHAIRMAN GRADISON: Thank you. Mr. Vice Chairman Simmons?

VICE CHAIRMAN SIMMONS: Thank you, Madam Chairman. I'd like to join my colleagues in praising Commissioner Phillips and this spirit of collegiality and due diligence that she has brought these issues together before us today.

I've written several memorandums as it relates to MC-177 cases, and in the interest of time I won't expand beyond that in my memorandums that I've submitted to my colleagues and are available to the Commission watchers. In that regard, I am prepared to vote yes on all six issues.

[22] CHAIRMAN GRADISON: Thank you, Vice Chairman Simmons. I've strongly supported the Commission's past effort to rectify the problem of negotiated rates. We'd hoped that earlier steps that we took would resolve this problem. While they were a step in the right direction, we know that the problem persists and that the Commission must move forward with further measures if shippers are ever going to be extricated from this dilemma.

I fully support the proposition that the Commission must clarify its position with regard to its primary jurisdiction over these negotiated rates issues. Because the problem is so great, I'd go a step further than speaking only through 177.

I would also issue a rule which unequivocally sets forth the Commission's standards for determining when a shipper is entitled to a waiver of undercharges due to an unpublished but negotiated motor carrier rate. I'm supportive of any and all administrative measures which we can take to deal with these negotiated rates problems and am open to any suggestions for further action by this Commission. Finally, I continue to believe that the cleanest, most effective way to eliminate the problem is through legislation.

To open the discussion further, with regard to Commissioner Lamboley's statement that we need to build a record of our own experience before we issue a policy [23] statement, I'm of the opinion that with the 75 to the 100 cases we've issued, though they have been referred to us by the courts, this agency has never seen a negotiated rate it didn't like. We might just as well say that in a policy statement, both in of the 177 and the MCC-30090 proceedings, and move forward in that regard.

With regard to the addition of ALJs into the process, we have a one-step process today. We have a fine ALJ and Office of Hearings, and I agree that if the docket

becomes so voluminous that we are overwhelmed, that use of an ALJ might be the solution.

But for the time being, let's not take a one-step process and turn it into a two-step process. It seems to me we're all in agreement on that. I think that the language in the voting sheet it's pretty clear that we will work together with the GC's office. Proceedings and Hearings, to develop a flexible docket management plan. It seems to me that's the sort of unanimous endeavor that we undertake every day in working on managing our docket. I fail to understand why it requires a vote.

Having said that, are there any comments?

VICE CHAIRMAN SIMMONS: Yes, I would like to comment, Madam Chairman. As a member of the Commission, I certainly am not a clone for any 177 case that I didn't like. I like to think that each one of my votes is objective, with careful [24] thought, and not predetermined by any such action. That's the way I will approach these cases, as they're submitted to us on a case by case basis.

CHAIRMAN GRADISON: Commissioner Andre?

COMMISSIONER ANDRE: Yes. I have a question for Ms. Mackall, with regard to handling these cases in the Office of Proceedings. Isn't there a more streamlined way that you could be handling these cases, and thereby forego the necessity of bringing in ALJs?

MS. MACKALL: There certainly are different thing we can do. We haven't needed to look to them yet, because the docket is so small that we can handle it very easily with our current staff. If it were to balloon, we would start looking at other things to do. For example, shortening the decisions, batching them for a vote as the Commissioners have already mentioned, things like that.

COMMISSIONER ANDRE: So that would thus streamline the process?

MS. MACKALL: Yes.

COMMISSIONER ANDRE: Furthermore, isn't it true that if we were to bring ALJs into the picture, that they have an automatic delay built into their appellate process?

MS. MACKALL: Well, as the Chairman said, it is two steps. They issue an initial decision and then there's the right of appeal. The right of appeal involves the appeal, the [25] reply and then the Commission's decision on the appeal.

COMMISSIONER ANDRE: So it appears to me, Madam Chairman, that bringing the ALJs into the picture has a downside risk to it as well as the possible positive aspects of it, inasmuch as there's a real potential there for increasing regulatory lag, which I don't think you want to do and I don't think this Commission wants to do.

CHAIRMAN GRADISON: Commissioner Lamboley, did you have a comment?

COMMISSIONER LAMBOLEY: No.

CHAIRMAN GRADISON: Okay. Well, why don't we go ahead and vote? Any further comments before we call the roll? I'm going to suggest, in view of the statements that have been made here today, that we vote on items 1 through 4 at the same time. Those in attendance here have the voting sheet before them.

This covers the issue of whether the Commission should reopen Ex Parte MC-177. If the answer to that is yes, should the Commission clarify Ex Parte 177 to explain that the Commission's options represent the exercise of it sprimary jurisdiction and thus are binding and only subject to judicial review under the arbitrary and capricious standard.

The third item is if the answer to 1 is yes, should the Commission modify Ex Parte MC-177 to provide that the Commission will accept negotiated rates cases without court [26] referrals, and the fourth item, should the Commission continue to handle negotiated rates cases on a case by case basis.

COMMISSIONER PHILLIPS: Madam Chairman, before you do that, could I ask a procedural question of General Counsel Burk? Specifically, could you let us know whether or not reopening of MC-177 would be appropriate and whether we would require any type of additional comment, notice, or anything.

MR. BURK: It would be appropriate. It would not require additional comment. You are clarifying what you have already stated. It doesn't require any taking of comment from other people to let the public know what it is you meant by 177.

COMMISSIONER PHILLIPS: Thank you.

CHAIRMAN GRADISON: Is the Commission prepared to vote?

VICE CHAIRMAN SIMMONS: Yes.

CHAIRMAN GRADISON: Madam Secretary?

SECRETARY MCGEE: Commissioner Phillips?

COMMISSIONER PHILLIPS: Yes.

SECRETARY MCGEE: Commissioner Lamboley?

COMMISSIONER LAMBOLEY: Yes.

SECRETARY MCGEE: Commissioner Andre?

COMMISSIONER ANDRE: Yes.

SECRETARY MCGEE: Vice Chairman Simmons?

VICE CHAIRMAN SIMMONS: Yes.

[27] SECRETARY McGEE: Chairman Gradison?

CHAIRMAN GRADISON: Yes.

[Questions 1 to 4 answered in the affirmative, 5 to 0.]

CHAIRMAN GRADISON: Now with regard to item 5, I've made my position clear. Are there any other comments on item 5?

[No response.]

CHAIRMAN GRADISON: Hearing none, please call the role.

SECRETARY McGEE: Commissioner Phillips?

COMMISSIONER PHILLIPS: Yes.

SECRETARY McGEE: Commissioner Lamboley?

COMMISSIONER LAMBOLEY: Yes.

SECRETARY McGEE: Commissioner Andre?

COMMISSIONER ANDRE: No.

SECRETARY McGEE: Vice Chairman Simmons?

VICE CHAIRMAN SIMMONS: Yes.

SECRETARY McGEE: Chairman Gradison?

CHAIRMAN GRADISON: I vote no because I would prefer to go ahead and respond with a rule at this time in addition to handling these cases on a case by case basis.

[Question 5 answered in the affirmative, 3 to 2.

CHAIRMAN GRADISON: Item number 6, if negotiated rate cases will continued to be handled on a case by case basis, [28] should the Commission direct the Offices of General Counsel, Proceedings and Hearings to develop a flexible docket management plan that will provide for the participation of the Commission's administrative law judges in resolution of negotiated rate cases.

SECRETARY McGEE: Commissioner Phillips?

COMMISSIONER PHILLIPS: Yes.

SECRETARY McGEE: Commissioner Lamboley?

COMMISSIONER LAMBOLEY: Yes.

SECRETARY McGEE: Commissioner Andre?

COMMISSIONER ANDRE: No.

SECRETARY McGEE: Vice Chairman Simmons?

VICE CHAIRMAN SIMMONS: Yes.

SECRETARY McGEE: Chairman Gradison?

CHAIRMAN GRADISON: I vote no. I think that we can handle this on a regular case by case basis, and that a vote is not required to include administrative law judges in the procesing of cases should we choose to do so at a later date.

[Question 6 answered in the affirmative, 3 to 2.]

CHAIRMAN GRADISON: The Commission has tried yet again to take an action with regard to our negotiated rates problem. A draft decision reflecting today's vote will be prepared and circulated for notation voting. With that—

COMMISSIONER PHILLIPS: Madam Chairman?

CHAIRMAN GRADISON: Yes?

[29] COMMISSIONER PHILLIPS: I would like to just take this opportunity to thank my colleagues, my staff and the Commission staff for all their help in this process.

CHAIRMAN GRADISON: Thank you, Commissioner Phillips. Are there any other closing statements?

[No response.]

CHAIRMAN GRADISON: Hearing none, this hearing is adjourned.

[Whereupon, at 10:39 a.m., the hearing was adjourned.]